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# Confronting and Critiquing White Privilege in Anti-Discrimination Enforcement

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## **CONFRONTING & CRITIQUING WHITE PRIVILEGE IN ANTI-DISCRIMINATION ENFORCEMENT**

### **TABLE OF CONTENTS**

INTRODUCTION.....	2
PART I: DEFINITIONS & FRAMEWORKS .....	5
PART II: PERSONAL CONTEXT .....	9
PART III: ANTI-DISCRIMINATION WORK & WHITE PRIVILEGE .....	13
Part III.A: Personal Obstacles .....	13
Part III.B: Legal Obstacles .....	16
PART IV: COMBATTING WHITE PRIVILEGE IN ANTI-DISCRIMINATION WORK.....	23
Part IV.A: Theoretical Techniques to Confronting White Privilege .....	23
Part IV.B: The Importance of Confronting White Privilege .....	26
Part IV.C: Utilizing the MCAD & the ICHRC Techniques.....	29
PART V: CONCLUSION.....	3

## INTRODUCTION

Approximately three months after I started working as a full-time compliance officer for the Massachusetts Commission Against Discrimination (the MCAD), I found myself in a situation that I had only passingly considered as a White, 23-year old woman: my White<sup>1</sup> privilege. I was the investigator assigned to conduct intake that day, meaning that if an individual came into the office and wanted to discuss an issue or, more likely, file a complaint of discrimination with the Commission, he or she met with me. It was approximately 4:30 p.m. and, as the office closes at 5:00 p.m. and intakes require between 45 minutes to two hours to conduct, it was past the time investigators usually begin interviews. When I was called to the front desk to speak with the person who had arrived, I met a tall, middle-aged African American woman who was dressed in traditional business attire. I shook her hand, introduced myself, and explained both the intake process and the fact that I would need to set up a meeting with her later in the week to conduct the interview. When I was finished, she said, “That’s fine, but I will need to speak with someone who is Black.” I explained that, given the schedule the investigators work under, she would be meeting with me. She reiterated that she wished to speak with a Black investigator only, and when I attempted to explain that the investigators were assigned intakes by day of the week, not by type of complaint, she told the receptionist that “this was ridiculous,” and “she [meaning me] won’t get it.” My supervisor, a White woman, then came out of her

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<sup>1</sup> Throughout this paper, I have made the choice to capitalize “White,” along with any other racial groups I may specify. I do this for similar reasons that Barbara J. Flagg chose not to capitalize black and white in her paper, namely “to encourage white people to break free from our tendency to associate *race* with people of color, and to develop instead a positive racial awareness of whiteness.” Barbara J. Flagg, *“Was Blind, But Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 954 n.7 (1993). By capitalizing White, I hope to consciously and repeatedly affirm my commitment to seeing my Whiteness as an identity, as opposed to just the norm, and believe that calling attention to this commitment by capitalizing White, Black, Asian, etc. will further these goals.

## Confronting & Critiquing White Privilege in Anti-Discrimination Enforcement

office and, after speaking with the woman and confirming her request, conferred with the one African American investigator the Commission employed at the time. They arranged for the woman to speak with that investigator later in the week. After the woman left, I apologized to my supervisor for upsetting the complainant. My supervisor said it was fine, and was just an unfortunate example of people's expectations not coinciding with the MCAD's capabilities.

I wanted to begin with that story because I believe it exemplifies some of the subtle, telling problems I have encountered through my work as a compliance officer and investigator. In that instance, although I could understand, on an objective level, that the woman might feel more comfortable speaking with someone who was also African American, on a more immediate, subjective level, I was upset—upset that the woman believed I would not be able to competently do my job because I was White, and upset that I had appeared incompetent or insensitive in front of my supervisor. In other words, I was upset that my Whiteness had been pointed out and, appropriately, interrogated.

Through this paper, I trace, confront, and analyze how my White privilege (and my emerging awareness of it) has impacted both the work that I have done and also the way I experience and understand that work. Specifically, I examine the ways in which working as a compliance officer, and later as a legal intern at the Iowa City Human Rights Commission (the ICHRC), have informed and challenged my understanding of privilege, social justice, and the often frustrating, interconnected sphere that both occupy. While I offer personal context to my work at the MCAD and my internship in Iowa City, I primarily focus on the different administrative policies each office uses to conduct anti-discrimination investigations. Specifically, I examine the MCAD's requirement that investigators interview complainants and then write a draft for the complainant to review and sign, while the ICHRC requires the

complainant to fill out his or her own form and then later, if necessary, records and transcribes interviews with the named parties. In doing so, I consider the ways in which these different policies provide me with distinct tools through which my privileged expectations and assumptions can be exposed and, hopefully, mitigated against.

Part I of this paper establishes the different definitions and theoretical frameworks I utilize throughout this piece, with particular emphasis on the important work done by Barbara J. Flagg<sup>2</sup>, Peggy McIntosh<sup>3</sup>, Adrienne D. Davis, and Stephanie M. Wildman.<sup>4</sup> I also examine some of the reasons for the persistence of White privilege. In Part II, I briefly describe my personal conceptualization of my privilege and anti-discrimination work before I began working for the MCAD. I primarily focus on my family's firm belief in meritocracy and detail how my four years at college solidified my beliefs regarding social justice. In Part III, I discuss some of the difficulties I encountered while working for the MCAD, as I had to confront and examine my personal and systematic White privilege, while also working to enforce anti-discrimination regulations. Along with those personal obstacles, I also highlight some of the conflicts between anti-discrimination jurisprudence and the persistence of White privilege. In Part IV, I describe different suggestions that have been presented to combat White privilege, including, in effect, Richard Delgado's call for counterstorytelling<sup>5</sup>, and then illustrate how using those suggestions

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<sup>2</sup> Flagg, *supra* note 1.

<sup>3</sup> Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack* (1989), <http://nationalseedproject.org/white-privilege-unpacking-the-invisible-knapsack>.

<sup>4</sup> Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245 (2005); Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881 (1995) [hereinafter "Wildman & Davis, *Language and Silence I*"]; Stephanie M. Wildman with Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, in CRITICAL RACE THEORY: THE CUTTING EDGE 573 (Richard Delgado ed. 1998) [hereinafter "Wildman & Davis, *Language and Silence II*"]

<sup>5</sup> Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988) (discussing the power of storytelling and counterstorytelling as it relates to

will improve both the intake process and the investigatory outcome. Finally, I identify and examine some of the policies and procedures utilized by the MCAD and the ICHRC that helped me identify and mitigate against my White privilege.

### PART I: DEFINITIONS & FRAMEWORKS

The reality of White privilege, and the scholarship surrounding it, has been one of the focuses of Critical Race Theory and Critical White Studies scholars for many years.<sup>6</sup> Although the term “White privilege” has various components and consequences, Peggy McIntosh’s description in her 1989 essay provides a valuable overview of the concept. McIntosh describes White privilege as “an invisible package of unearned assets that I can count on cashing in each day, but about which I was ‘meant’ to remain oblivious.”<sup>7</sup> Contained within this package are “special provisions” that, invisibly and seemingly naturally, assist her throughout her daily activities.<sup>8</sup> McIntosh lists numerous psychological and material privileges she receives daily because she is White, including “never [being] asked to speak for all the people of my racial group” and being able to “choose blemish cover...in ‘flesh’ color and hav[ing it] more or less match my skin.”<sup>9</sup> Importantly, although the term “privilege” is usually used to denote earned and conferred favors, McIntosh explains that because White privilege is awarded based on the subjugation of others, particularly African Americans, White privilege does not just include the

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opposing oppression) [hereinafter “Delgado, *Storytelling for Oppositionists*”]; Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990) (discussing the importance of including people of color in the academic conversations regarding race relations and academia) [hereinafter “Delgado, *Does Voice Really Matter?*”].

<sup>6</sup> See *supra* notes 1–4. See generally Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (discussing the ways in which Whiteness as an identity has legally become a form of property rights that must be protected); Bela August Walker, *Privilege as Property*, 42 WASH. U. J.L. & POL’Y 47 (examining Wildman and Harris’s work in order to examine the ways that White privilege has become a form or property, along with Whiteness as an identity).

<sup>7</sup> McIntosh, *supra* note 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

advantages, but also the dominance over others.<sup>10</sup> Consequently, “privilege encompasses both the individual beneficiary and the systemic nature of the benefit. While privilege serves the individual holder, it is the systemic nature of privilege... that supplies its societal force.”<sup>11</sup>

Stephanie M. Wildman and Adrienne D. Davis describe three main components of White privilege that I will later attempt to apply to my investigatory work: (1) “the characteristics of the privileged group define the societal norm, often benefiting those in the privileged group,” (2) “privileged group members can rely on their privilege and avoid objecting to oppression,” and (3) “privilege is rarely seen by the holder of the privilege.”<sup>12</sup> As for the first component, Wildman explains that because Whites are members of the socially dominant group, the characteristics and attributes of Whites (the holders of the privilege) “are described as societal norms—as the way things are and as what is normal in society.”<sup>13</sup> Because these characteristics are considered “normal” or “natural,” everyone in society is judged against them, further subjugating those who do not fit into that constructed ideal.<sup>14</sup>

Secondly, Wildman explains that an aspect of White privilege is being able to opt out of considering or opposing oppression, a privilege that is “exercised by silence.”<sup>15</sup> As an example, Wildman describes a moment during jury selection when she failed to confront a prosecutor’s racist questions—by not saying anything, Wildman exercised her White privilege.<sup>16</sup> McIntosh

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<sup>10</sup> *Id.*

<sup>11</sup> Wildman, *supra* note 4, at 247.

<sup>12</sup> Wildman & Davis, *Language and Silence II*, *supra* note 4, at 574.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Wildman & Davis, *Language and Silence I*, *supra* note 4, at 892.

<sup>16</sup> *Id.*

confirms this when she explains that “the pressure to avoid is great, for in facing [White privilege] I must give up the myth of meritocracy.”<sup>17</sup>

The final listed component of White privilege is the invisibility of that privilege. Because part of White privilege is being able to legally and socially construct what is “White” to mean what is “normal,” one of the consequences of White privilege is that the holder of the privilege is no longer able to perceive it—everything just is the way it is.<sup>18</sup> Barbara Flagg defines this invisibility of privilege as the “transparency phenomenon,” or “the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific.”<sup>19</sup> Flagg notes that Whites are not incapable of seeing the race of other Whites; rather, “whites' social dominance allows us to relegate our own racial specificity to the realm of the subconscious” so that “[o]nce an individual is identified as white...he becomes effectively raceless in the eyes of other whites.”<sup>20</sup> This tendency toward transparency is so strong that it becomes “a defining characteristic of whiteness: to be white is not to think about it.”<sup>21</sup>

Along with describing the general components of White privilege, it is also important to note some of the reasons White privilege, and particularly the transparency phenomenon, persist. One primary reason for this persistence is the importance of the idea of meritocracy to the American ideal. Because privilege allows Whites to determine what is “normal” and therefore become blind to their privilege, “members of society are...measured against the characteristics that are held by those privileged.”<sup>22</sup> Consequently, privilege becomes disguised as merit so that the “[a]chievements by members of the privileged group are viewed as meritorious and the result

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<sup>17</sup> McIntosh, *supra* note 3.

<sup>18</sup> *Id.*

<sup>19</sup> Flagg, *supra* note 1, at 957.

<sup>20</sup> *Id.* at 971.

<sup>21</sup> *Id.* at 970.

<sup>22</sup> Wildman & Davis, *Language and Silence I*, *supra* note 4, at 890.



of individual effort.”<sup>23</sup> Although “merit is a constructed idea, not an objective fact”<sup>24</sup> and “serves to keep power in the hands of the [privileged] group,”<sup>25</sup> this desire to continue to see oneself as individually meritorious rather than racially privileged is very strong: “If [privilege is] true, this is not such a free country; one’s life is not what one makes it; many doors open for certain people through no virtues of their own.”<sup>26</sup>

Another aspect of the persistence of White privilege is the way in which blindness to it allows Whites to think of racism and discrimination as individual occurrences, rather than by-products of systematic privilege and resulting oppression. Specifically, partly because of the move toward a colorblind society, racism has been re-characterized as individual and aberrational.<sup>27</sup> Not only does this individualization blind Whites to systematic racism, but it also allows them to only focus on how they can individually appear non-racist, as opposed to confronting and analyzing the privilege they receive from that oppressive system.<sup>28</sup>

A third reason for the persistence of White privilege is the tendency to categorize and equate different systems of oppression. Because Whites tend to individualize their experiences and their understanding of oppression, they often believe that “someone subordinated under one form of oppression would be similarly situated to another person subordinated under another system or form.”<sup>29</sup> Specifically, there is a tendency among Whites to equate different forms of oppression without considering the significant differences between them. Consequently, a White

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<sup>23</sup> *Id.*

<sup>24</sup> Flagg, *supra* note 1, at 1771.

<sup>25</sup> McIntosh, *supra* note 3.

<sup>26</sup> *Id.*

<sup>27</sup> See Wildman *supra* note 4, at 252 (explaining that the push toward a colorblind society “promotes an attitude that since society should not notice race, ‘we don’t have a problem anymore,’” which consequently lets Whites off the hook from analyzing or critiquing the privilege they get from a racist society that cannot be un-racialized).

<sup>28</sup> Wildman & Davis, *Language and Silence II*, *supra* note 4, at 573.

<sup>29</sup> *Id.*

woman who is oppressed under one system, sexism, does not consider herself as benefiting or oppressing under a different system, racism, thereby perpetuating White privilege and the transparency phenomenon.<sup>30</sup>

## PART II: PERSONAL CONTEXT

In this Part, I consider how I understood and conceptualized both discrimination and my White privilege before I began working as a compliance officer. Specifically, I discuss how my mother's professional experience, and the way she explained it to me growing up, shaped my understanding of meritocracy, privilege, and discrimination.

If I had to describe my parents' primary method of motivation growing up, it would be simple: if you work hard, you will achieve what you want. Although my parents may have differed on what my ultimate goal should be, the theme of hard work and just rewards was constant. My parents still consider the fact that they were able to send me and my sister to private primary and secondary schools to be the single best thing they did for us. To this day, if I voice doubt regarding my abilities, my father is quick to tell me, "They wouldn't have hired you/accepted you/given you this project if you hadn't shown them you could do it." Part of this is certainly my parents' desire to love me and support me in my goals by giving me an excellent education. Tied to their wish to give me and my sister private, rigorous schooling was also their pride in the fact that they *could* give us that education; that because they worked hard and lived frugally well into their 30s, they could send me to a school founded in the 18th Century and steeped in academic tradition. However, implicit in this pride and these goals was also their belief in the importance of individual meritocracy. Specifically, my parents' singular certainty in the power of education points to a distinct aspect of meritocracy—once you get a leg up on

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<sup>30</sup> *Id.*

## Confronting & Critiquing White Privilege in Anti-Discrimination Enforcement

something as key as education, as long as you work hard and use that education correctly, you will succeed. The idea that the privilege that attached to their White skin may have also played a role in their success was either rarely thought about, or was only passingly acknowledged as a minor factor in an otherwise meritorious and deserved story.

This is particularly true for my mother, a woman who did not get her B.A. until she was 30 and did not graduate from Dental school until she was 37 with two young twins. For her, school opened up an entirely new world where she could achieve something just by working hard and being herself. When I asked her years later how she handled the often blatant sexism she encountered in the early 1990s and during school, she would almost brush it off, explaining that it was just a reality of life and that she had instead focused on herself, making sure that she did well enough to prove her male professors and colleagues wrong. Even in the mid-2000s, when she became the first female president of the Academy of Stomatology and was handed an award with male pronouns, she simply laughed and said, “Yeah, but I’m the President, aren’t I?” I in no way mean to disparage my mother’s achievements, especially as I am still consistently in awe of her persistence and desire to teach rather than privately practice. Yet her conceptualization of her success, and how it was, in turn, communicated to me, had important implications on how I understood merit, oppression, and privilege.

First, because my mother either rejected systematic characterizations of her achievement or, alternatively, conceptualized her merit as a response against the individual sexist beliefs of her colleagues and superiors, discrimination and merit have repeatedly been explained as individual occurrences or characteristics to me. This is evident in how my mother often strains to individualize her experience—she has always been more interested in forwarding her career and doing something she was interested in than considering what her achievement signaled about her

gender. For her, contextualizing her achievement against the gender dynamics of the late 1980s and 90s takes away from the reality of the work she was doing. Even when she does concede the impact her gender had on her career, the framework is consistent: for her, it was not that the men around her were receiving male privilege and she was not, it was that they, individually, were sexist, and she was a woman. Consequently, when she began achieving her career goals, she viewed herself as fighting against their individual, sexist beliefs, not the system of male privilege that had already placed them a step ahead of her. Growing up, therefore, I was inspired to focus on myself and my work, rather than worry about how others viewed me, and that if I did confront sexism (or later, homophobia), it was because those individuals were biased and I could prove them wrong through hard work and persistence.

Connected to this way of thinking is the subtle way my mother's experiences, and my exposure to them, solidified my tendency to categorize and equate different patterns of oppression so that my White privilege remained unnoticed and unexamined.<sup>31</sup> On the few occasions my mother and I discussed race (an absence that, on its own, certainly contributed to my subsequent blindness to White privilege<sup>32</sup>), my mother often focused on racist oppression, rather than her resulting White privilege. These conversations usually stemmed from discussions about sexism (thereby unconsciously connecting and equating the two in my mind), and also often focused on a non-White student who was a wonderful dentist but had been treated badly by a colleague or patient. While these discussions clearly articulated the fact that someone's race

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<sup>31</sup> See *supra* accompanying text to notes 29–30.

<sup>32</sup> See Flagg, *supra* note 1, at 973 (noting that because “[m]ost whites live and work in settings that are wholly or predominantly white...whites rely on primarily white referents in formulating... norms and expectations”). Because I went to a predominantly White school and only discussed race, in detail, on a few occasions during the school year or at home, I both solidified the belief that what was normal for me (what was White) was normal for everyone else, and also viewed “race” as something that other people experienced or dealt with.

does not correlate with their abilities, and that to treat someone badly or differently because of their race or ethnicity was wrong, they also suggested that “race” was something other people had to deal with. Even though this ability to paint myself as raceless is one of the tenets of White privilege,<sup>33</sup> it was never presented to me as such. Instead, racism was just another form of oppression that impacted other people’s lives based on immutable characteristics. Additionally, this framework of racism made it so that I focused on individual subjugation, rather than examining the system of racism that had both simultaneously constructed beliefs about racial differences, while also providing me with White privileges, such as easier access to education or a merit system that awards achievements based on White-defined success.

As a final note in this Part, it would be disingenuous to state that my four years at Smith College did not challenge or expand these ideas. I was introduced to McIntosh’s “knapsack of privilege,” studied the importance of intersectionality as it applied to people’s experiences and our own biases, and learned about how ingrained systems of racism, sexism, and homophobia influence the ways we perceive and write about historical events. However, even with these progressive and important frameworks, I still held onto a basic idea of social change: (1) people should be judged with the same criteria, (2) even if systems of oppression allow individuals to discriminate or subordinate, the primary evil of discrimination is done through individual acts, and (3) once the law changes, society will follow. Consequently, when I accepted my position as a compliance officer, I believed that I understood the characteristics of discrimination, the best ways to combat it, and that, in some basic, material ways, I was privileged as a White person. The latter part of this paper will examine the ways in which I was wrong and how I came to that realization. More importantly, it will also consider how combatting White privilege in the

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<sup>33</sup> See *supra* accompanying text to notes 18–21.

context of enforcing anti-discrimination regulations is vital and necessary, and will consequently lead to more comprehensive, effective complaints and investigations.

### PART III: ANTI-DISCRIMINATION WORK & WHITE PRIVILEGE

#### III.A: Personal Obstacles

In many ways, working for the MCAD right out of college was the perfect introduction to the realities of social justice work. I primarily worked to enforce M.G.L. 151B<sup>34</sup> and, if applicable, Title VII<sup>35</sup>, two statutes that were well established and had largely permeated the American workforce.<sup>36</sup> As I interacted with complainants, respondents, and attorneys, wrote information request letters to gather relevant information for specific claims, and wrote dispositions determining whether or not respondents had likely engaged in discrimination, I was exposed to employment disputes and discriminatory actions. I also learned how to assess intent

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<sup>34</sup> Under this statute, “[i]t shall be an unlawful practice...[f]or an employer...because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation...genetic information, or ancestry of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such an individual in compensation or in terms, conditions or privileges or employment, unless based upon a bona fide occupational qualification.” M.G.L. 151B(4)(1).

<sup>35</sup> Under Section 703 of Title VII of the Civil Rights Act of 1964, it is illegal for an employer “(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a). Although the MCAD did not enforce Title VII, we would cross-file with the EEOC if the protected category cited in the complaint was also a protected category under federal law.

<sup>36</sup> Between 1998 (the first year statistics were made available) and 2014, approximately 48,804 employment discrimination cases have been filed at the MCAD. MASS. COMM’N AGAINST DISCRIMINATION, *Annual Reports* (2002-2014), <http://www.mass.gov/mcad/pubs-regs/annual-reports> (last visited Dec. 13, 2015) (assuming 84% of the approximately 58,100 total complaints were employment cases, as indicated by the average percentage referenced in each report). During that same time period, there were approximately 1.5 million EEOC complaints filed under Title VII, the ADEA, and the ADA. EEOC, *Charge Statistics FY 1997 Through 2014*, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Dec. 13, 2015).

and counteract discriminatory policies or practices through the enforcement of laws. I was excited to be able to directly and forcefully respond to illegal instances of discrimination that, prior to coming to the MCAD, I had primarily only impotently read about or had had described to me by my mother or classmates.<sup>37</sup>

What I did not expect was the intermittent unease I felt as I began to conduct my own intakes, draft my own complaints, and run into situations I could not categorize—situations like the one that began this paper. Although that example was the most overt instance of my Whiteness being interrogated, as I conducted more intakes by myself, I struggled to understand why complainants did not confide in me more readily. Additionally, when speaking with a complainant who was a person of color during an intake, I would occasionally find myself repeating the same question: “But *why* did you think you were being treating differently because of your race?” Although this scenario sometimes occurred while I was interviewing a woman about gender discrimination or an older employee reporting disparate treatment based on age, I began to notice that it happened much more frequently when I was conducting an intake with a person of color who was reporting race or color discrimination. I recognize now that the unease I felt was my realization that my experiences as a White person (especially one who had not fully realized the extent of her privilege) made me unable to adequately understand these complaints in both a legal and non-legal context. These observations were especially apparent considering the fact that, in 2014, employment discrimination complaints based on race and color were the

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<sup>37</sup> I do not mean to suggest that I had never experienced discrimination before I was hired by the MCAD. However, as I had gone to an all-women’s college (and lived as a bisexual in an extremely tolerant town) and had only held positions where my identity as a queer woman was an attribute rather than a detraction, my understanding and experience of discrimination came more in the forms of bi-invisibility or ignorant, gendered comments made by high school classmates that were easier to ignore than confront. Consequently, many of my perceptions regarding illegal discrimination (especially in employment) were based more on academic awareness rather than personal experience.

second highest type of discrimination alleged at the MCAD.<sup>38</sup> Finally, I became increasingly frustrated with the dissonance between complainants who truly believed they had been treated differently because of their race or color, and respondents who adamantly denied having taken the person's race into account. I was confused as to how there could be such a disconnect between two people's understanding of racial discrimination. As I explain in more detail below, these vastly different perceptions began to underscore to me how anti-discrimination regulations often struggle to fully respond to the more subtle and internalized realities of racial inequity and discrimination.

Looking back, it is clear to me now that some of the difficulties I faced were linked to the ways in which my White privilege and White identity were consistently being revealed as I did this work. Although I had certainly learned about the existence of White privilege in college, I had not necessarily *lived* that knowledge. While my mother's professional and personal discussions and my predominantly White college may have provided me with the tools to recognize my privilege, my own unconscious comfort in my White privilege and specific history had not provided me with an opportunity (or, more accurately and more depressingly, a reason) to use those tools.<sup>39</sup> I had existed not only in a predominantly White world, but also a world in which my individuality was repeatedly affirmed separately from my race. As Wildman and

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<sup>38</sup> See MASS. COMM'N AGAINST DISCRIMINATION, *2014 Annual Report*, 1, 9 (2014), <http://www.mass.gov/mcad/docs/annual-reports/2014-annual-report.pdf> (last visited Dec. 13, 2015). Although I do not have statistics regarding the race of each complainant, from personal experience, I only saw a small handful of White complainants report race discrimination during the two years I worked at the MCAD.

<sup>39</sup> This acquiescence to the "comfort zone in Whiteness" (the desire and ability to see things as they are, when "as they are" is comfortable and affirming) made it much more likely that I would continue living without actually experiencing the important theories I analyzed and discussed. See Wildman, *supra* note 4, at 255–56 (describing how "the comfort zone in whiteness" perpetuates White privilege). See also Wildman & Davis, *Language and Silence II*, *supra* note 4, at 577 ("I simply believe that no matter how hard I work at not being a racist, I still am. Because part of racism is systematic, I benefit from the privilege I am struggling to see.").



Davis note, “A white person can recede into privilege and not worry about racism whenever she or he chooses. People of color cannot.”<sup>40</sup> Although my awareness of my privilege certainly changed over my time at the MCAD, this discomfort (and my initial inclination to avoid it) made it much harder for me to consciously confront my White privilege or the way my White identity may have unconsciously shaped my conception of the world. However, as I will discuss in more detail below, this discomfort was, in some ways, a necessary step for me to begin to confront and critique my privilege and, later, to mitigate against its effects.

### III.B: Legal Obstacles

In addition to my own personal obstacles, my blindness to my White privilege was often affirmed and strengthened through the ways in which anti-discrimination regulations are investigated and enforced. Specifically, I will focus on (1) the requirement that claimants who assert disparate treatment claims<sup>41</sup> prove that their employer acted with discriminatory intent and, (2) the use of the reasonable person standard in discrimination investigations. Without mitigating strategies, both policies often frustrated my ability to recognize my White privilege and challenge the impact that my White privilege had on my conception of discrimination.

As for the intent requirement, under current anti-discrimination law, if a complainant files a disparate treatment claim, the complainant must prove that the employer acted with discriminatory intent and took the complainant’s protected category into account when making

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<sup>40</sup> Wildman & Davis, *Language and Silence I*, *supra* note 4, at 901.

<sup>41</sup> The two primary theories of discrimination are disparate treatment and disparate impact. Under disparate treatment, “[t]he employer simply treats some people less favorably than others because of their [protected category]....Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.” *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Because most discrimination claims are brought under the disparate treatment theory, they were the types of cases I investigated the most frequently; consequently, I will focus my analysis in this paper on my investigations of disparate treatment based on race.

the employment decision (hiring, terminating, failure to promote, etc.).<sup>42</sup> As discussed by Linda Hamilton Krieger,<sup>43</sup> this intent requirement influences the way people conceptualize discrimination in many ways; I focus on just one of those influences: the individualization of discriminatory intent.

The requirement of intent primarily surfaces in the third prong of the established McDonnell Douglas burden-shifting framework,<sup>44</sup> whereby a complainant must first prove a *prima facie* case of discrimination.<sup>45</sup> The respondent must then provide a legitimate, non-discriminatory reason for the decision and, in the third step, the complainant must show that the respondent's proffered reason is merely pretext for discrimination.<sup>46</sup> Because the second step of the burden-shifting framework (that the respondent provide a legitimate, non-discriminatory reason) is relatively easy for an employer to articulate and offer supporting evidence for, Hamilton Krieger explains that most Title VII cases hinge on the third step, where an employee must show that the proffered reason is untrue and that the individual acted with discriminatory intent.<sup>47</sup> Consequently, "finding against an employer at the third stage of proof is, in essence,

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<sup>42</sup> See *Teamsters*, 431 U.S. at 335 n.15 (explaining that disparate treatment claims require that the decisionmaker have a discriminatory motive and take the person's protected category into account); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (the plurality holding that even with mixed-motive discrimination claims, the person's protected category had to be a motivating factor in the decision so that the employer was making a conscious decision to consider the individual's protected category, along with other factors, in its decision).

<sup>43</sup> Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

<sup>44</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>45</sup> Under *McDonnell Douglas*, a complainant complaining of termination in employment must show that (1) he was a member of a protect class, (2) he was working in a job for which he was qualified, (3) his employment was terminated, and (4) his position remained open or was filled by someone with similar qualifications. *McDonnell Douglas*, 411 U.S. at 802. Importantly, the requirements for a *prima facie* case will depend on the type of discrimination (hiring, termination, failure to promote, etc.) that the employee alleges is discriminatory. *Id.* at n.13.

<sup>46</sup> *Id.* at 802.

<sup>47</sup> Hamilton Krieger, *supra* note 43, at 1178.

finding that the employer has lied to the plaintiff and the court.”<sup>48</sup> Importantly, even showing that the respondent has lied is sometimes not sufficient to find for the plaintiff: in *Hicks*, the Court explained that even in situations in which the factfinder does not believe the defendant’s reason and has a “suspicion of mendacity,” the factfinder *may* find for the plaintiff, but is not *compelled* to do so.<sup>49</sup>

Along with being inconsistent with the ways in which individuals actually make decisions,<sup>50</sup> requiring employees to essentially show that the employer is lying perpetuated my

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<sup>48</sup> *Id.*

<sup>49</sup> *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1992). In a later case, the Court confirmed this heightened requirement when it said that even in situations where the respondent’s proffered reason is untrue, “if the plaintiff created only a weak issue of fact as to whether the employer’s reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred,” then the factfinder could find against the plaintiff. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000). As Hamilton Krieger explains, without automatic presumption of liability, factfinders are left with only “one overwhelming influence on [their] decisionmaking: [their] preexisting biases regarding the prevalence of conscious, intentional discrimination.” Hamilton Krieger, *supra* note 43, at 1226. In other words, if factfinders are not compelled to find that discrimination is the most likely explanation when a respondent’s reasons are proven to be untrue, then factfinders are more likely to use their understanding of how often discrimination occurs to determine whether the respondent was actually motivated by discriminatory intent. In the context of White privilege and colorblind society, this rule makes it even more unlikely that White factfinders will find discriminatory intent, as White privilege allows Whites to see discrimination as aberrational acts of blatant and individual racism. Based on their privileged view that discrimination does not occur very often, this rule heightens the individualization of discrimination and further blinds White investigators to their White privilege. *See Flagg*, *supra* note 1, at 968 (noting that “white people tend to view intent as an essential element of racial harm...For black people, however, the fact of racial oppression exists largely independent of the motives or intentions of its perpetrators”).

<sup>50</sup> Another important component of Hamilton Krieger’s article is her critique on the assumptions people make about how employment decisions are influenced by implicit biases. Hamilton Krieger notes that because anti-discrimination jurisprudence considers only whether there was a discriminatory intent at the *moment* the decision was made, the case law “does not recognize that categorization based on race, sex, or national origin may distort perception, memory and recall for decision-relevant events” so that when the employer makes the employment decision, he is influenced by past interactions, assumptions, and implicit categorizations that he is unaware he has made. Hamilton Krieger, *supra* note 43, at 1167. Additionally, by making such a distinction between intent and non-intent, anti-discrimination jurisprudence assumes that decisionmakers possess a “transparency of mind,” whereby “they can accurately identify why they are about to

blindness to my White privilege as I investigated anti-discrimination complaints. By requiring that a complainant show intent (either directly or through inference) by proving that the employer is lying, anti-discrimination jurisprudence paints all employers found to be liable under Title VII as individual, bad actors who act outside the otherwise race-neutral norm. This individualization makes discrimination seem like an “anecdotal problem”<sup>51</sup> so that an employer found liable under Title VII is a member of a “lunatic fringe”<sup>52</sup> unassociated with “the everyday life of well-meaning white citizens.”<sup>53</sup> Consequently, by viewing discriminatory decisions as an individual action that is separate from the way most individuals live their lives, both the intent requirement and the way that it paints each employer as a liar allowed me to ignore the systematic nature of racism and, therefore, the privileges that such a system of oppression afforded me.<sup>54</sup> Additionally, as mentioned above, by construing discrimination as an intentional, individual action, anti-discrimination jurisprudence allows White people to focus only on appearing non-racist (i.e. as not intentionally considering race), as opposed to considering the systematic aspects of racism, the privilege they receive from that system, and ways to combat both.<sup>55</sup> Finally, under the heightened requirement of *Hicks*, White factfinders are able affirm their privileged belief that discrimination is an individual, atypical action, even in situations in which the respondent’s proffered reason is proven to be incorrect, or even a lie.<sup>56</sup>

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make, or have already made, a particular decision.” *Id.* Such an assumption ignores the complicated and often unconscious ways that people make possibly discriminatory decisions.

<sup>51</sup> Wildman, *supra* note 4, at 254–55.

<sup>52</sup> Wildman & Davis, *Language and Silence I*, *supra* note 4, at 888–89.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 887–89 (“To label an individual a racist veils the fact that racism can only occur where it is culturally, socially, and legally support.”).

<sup>55</sup> *Id.*

<sup>56</sup> See *supra* note 50.

## Confronting & Critiquing White Privilege in Anti-Discrimination Enforcement

In the context of my work at the MCAD, as I investigated disparate treatment claims, and therefore used the intent requirement to determine whether a respondent was lying, I consistently focused on the individual actor, separate from any broader system of racism or discrimination. Without any mitigating techniques, I was therefore able to confirm my limited belief that anti-discrimination regulations were primarily used to weed out bad actors, rather than a means of challenging internalized and systematic racism. Additionally, by conceptualizing intentional discrimination as an individual act, I could more easily compare the person's discriminatory activity to my own activity, confirm that I harbored no intentional discriminatory animus, and conclude that (1) I was not racist and (2) I therefore did not gain any privileges from whatever racist system had allowed that bad actor to make his discriminatory decision in the first place. Consequently, this individualized conception of discrimination allowed me to ignore the multi-faceted ways discrimination occurs, how it is influenced by White norms,<sup>57</sup> and how I may be individually privileged by such a system.

Along with the intent requirement, another aspect of anti-discrimination jurisprudence that easily perpetuated my blindness to White privilege was the use of the reasonable person standard, both implicitly and explicitly, in discrimination investigations. The reasonable person standard was articulated in *Harris*,<sup>58</sup> which involved a claim of sexual harassment discrimination. Under this standard, in order to be actionable, the conduct must be severe or pervasive enough that it "create[s] an objectively hostile or abused environment—an

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<sup>57</sup> See Hamilton Krieger, *supra* note 43, at 1181 (noting that the intent requirement also assumes that absent intentional discrimination, employers make race-neutral decisions). Such an assumption allows those decisionmakers (and often times the White investigators reviewing those decisions) to ignore the ways in which the criteria they may use to make a decision are often influenced by White-centric, and therefore race-centric, ideas of what is and is not "normal" or "neutral."

<sup>58</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

environment that a *reasonable person* would find hostile or abusive....”<sup>59</sup> Although a few courts have found that, in racial harassment cases, the appropriate standard is to determine whether a reasonable person of the same protected category as the plaintiff would find the conduct offensive or hostile,<sup>60</sup> the current prevailing harassment standard is the “reasonable person” standard articulated in *Harris*.<sup>61</sup> In addition to this legal standard, investigators must also use a less explicit reasonable person standard when considering the evidence presented in a complaint. For instance, even outside harassment complaints, investigators must generally consider whether a respondent’s proffered reason is reasonable and race-neutral, or whether a complainant’s explanation for certain activities was a reasonable reaction or interpretation, given the circumstances of the situation.<sup>62</sup> Consequently, when investigating discrimination complaints,

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<sup>59</sup> *Id.* at 21.

<sup>60</sup> See *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1115 (9th Cir. 2004) (explaining that “allegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff”); *Harris v. Int’l Paper Co.*, 765 F. Supp. 1509, 1516 (D. Me. 1991) (vacated in part by *Harris v. Int’l Paper Co.*, 765 F. Supp. 1529 (D. Me. 1991)) (holding that “the appropriate standard to be applied in this hostile environment racial harassment case is that of a ‘reasonable black person’”).

<sup>61</sup> See E.E.O.C., *Harassment*, <http://www.eeoc.gov/laws/types/harassment.cfm> (last visited Dec. 13, 2015). The Supreme Court did explain that, under the *Harris* standard, the court must look at the social context of the harassment and how that may impact whether a reasonable employee under similar context would reasonably believe the actions to be discriminatory. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998).

<sup>62</sup> See *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1992) (explaining that just because a reasonable factfinder does not believe the reason proffered by defendants under the McDonnell Douglas burden-shifting framework does not mean that the fact finder is *compelled* to find that discrimination therefore occurred); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) (“[T]here will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant’s explanation, no rational factfinder could conclude that the action was discriminatory.”). As an example, the Court explains that “if the plaintiff created only a weak issue of fact as to whether the employer’s reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred,” then the factfinder can find against the plaintiff). *Id.* Not only do these cases arguably heighten the requirement that plaintiffs prove that the defendant has lied, *see supra* note 50 and accompanying text, they both use the standard of a “rational” or “reasonable” factfinder to determine whether either party has met its burden. Consequently, whether a reason provided by

investigators must explicitly and implicitly consider the facts of the case from the standpoint of an objective, reasonable person.<sup>63</sup>

When used by White investigators, I believe this standard can help maintain White investigators' blindness to both their White privilege and also the ways in which that blindness may impact their decisions. Specifically, when I used this standard, I was repeatedly (albeit unconsciously) using my understanding of what "reasonable" and "normal" meant in the context of employment. That understanding of the standard was based on my privileged conception of the world as a White person. As explained above, a key component of White privilege is that members of the privileged group (i.e. Whites) are able to determine what is and is not "normal."<sup>64</sup> Members of society are therefore repeatedly judged against those White-specific characteristics so that the privileged characteristics are reaffirmed as normal<sup>65</sup> and the holders of the privilege remain blind to how their privileged identity impacts their experiences or perspectives.<sup>66</sup> Consequently, although I was certainly an impartial, non-biased factfinder, my consistent use of the reasonable person standard repeatedly allowed me to unconsciously use employment standards that I had been taught were reasonable and neutral, but were in fact based

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either the respondent or plaintiff is "weak" or "contradictory" depends on the viewpoint of the reasonable factfinder, including any biases or privileges that factfinder may hold. Similarly, the 10th Circuit has held that a plaintiff can show pretext by identifying "weaknesses, implausibilities, [or] inconsistencies...[such] that a *reasonable* factfinder could *rationaly* find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reason." *Garrett v. Hewlett Packard Co.*, 305 F.3d 1210, 1217 (10th Cir. 2002)(emphasis added).

<sup>63</sup> *Id.*

<sup>64</sup> Wildman & Davis, *Language and Silence II*, *supra* note 4, at 574.

<sup>65</sup> Wildman & Davis, *Language and Silence I*, *supra* note 4, at. 890 ("This normalization of privilege means that members of society are judged, and succeed or fail, measured against the characteristics that are held by those privileged.").

<sup>66</sup> Flagg, *supra* note 1, at 957.

on my privileged conception of the world.<sup>67</sup> Under this standard, for example, I was more likely to label a seemingly race-neutral policy as a race-neutral policy based on my privileged belief that discrimination is largely aberrational and intent-based.<sup>68</sup> Importantly, even though I believe that blatant subjectivity cannot not survive in any self-aware investigatory setting, the prevalence of the reasonable person standard in discrimination work implicitly confirmed (or at least did not critique) my belief that what I had been taught was reasonable in an employment setting was, in fact, reasonable for everyone. The opportunities to combat that privileged belief were, therefore, limited.

#### PART IV: COMBATTING WHITE PRIVILEGE IN ANTI-DISCRIMINATION WORK

Although the two aspects of anti-discrimination jurisprudence that I outlined above may have limited my ability to acknowledge and challenge my White privilege (particularly in the beginning of my time at the MCAD), I do believe that confronting one's privilege is not only possible, but also necessary, in order to successfully engage in anti-discrimination work. With that in mind, I now turn to a discussion of the different mitigating techniques that have been proposed, with particular emphasis on how exposing one's White privilege improves the intake and investigative process. I also identify and analyze some of the policies used by both the MCAD and the ICHRC, which I believe provided me with the best opportunity to confront and critique my White privilege.

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<sup>67</sup> *Id.* at 973 (“Most whites live and work in settings that are wholly or predominantly white. Thus whites rely on primarily white referents in formulating the norms and expectations that become criteria of decisions for white decisionmakers.”).

<sup>68</sup> *Id.* at 968 (noting that “white people tend to view intent as an essential element of racial harm...For black people, however, the fact of racial oppression exists largely independent of the motives or intentions of its perpetrators”).



Part IV.A: Theoretical Techniques to Confronting White Privilege

There are three suggestions to confronting and combatting White privilege that I believe are particularly applicable to anti-discrimination work: (1) creating and maintaining a skepticism about seemingly race-neutral policies or actions (including my own), (2) considering and incorporating intersectionality into my conceptions of discrimination, and (3) having conversations with people of color and encouraging storytelling. The concept of skepticism comes from Flagg, who encourages Whites to “adopt a deliberate and thorough-going skepticism regarding the race neutrality of facially neutral criteria of decision.”<sup>69</sup> As Flagg argues, consciously creating skepticism about the race neutrality of facially neutral criteria will not only allow Whites to begin to create a positive White identity separate from supremacist ideals,<sup>70</sup> but will also prompt Whites to consider how the criteria they are using are White-specific and may disadvantage or oppress non-White individuals.<sup>71</sup>

Another way to combat White privilege is to consider the intersectionality<sup>72</sup> of people’s experiences and identities. As mentioned above, one of the reasons that White privilege persists

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<sup>69</sup> *Id.* at 977.

<sup>70</sup> If someone is consciously skeptical of facially neutral criteria or policies, then he may begin to see how the neutral criteria are actually White-specific, thereby allowing him to understand his Whiteness as an identity that is not the “norm” and is not better than non-White identities. *Id.* at 1017 (“[T]he skeptical stance can be instrumental in the development of a positive white racial identity, one that comprehends whiteness not as *the* (unspoken) racial norm, but as just one racial identity among many.”).

<sup>71</sup> *Id.* at 979. Consequently, “the skeptical decisionmaker may opt to temper his judgment with a simultaneous acknowledgment of his uncertainty concerning nonobvious racial specificity.” *Id.* at 977. *See also* Wildman, *supra* note 4, at 264–65 (“Combating the persistence of privilege requires self-consciousness about these socio-cultural patterns and the material conditions that maintain the white privilege reality. Self-consciousness can be the first step toward action.”).

<sup>72</sup> Intersectionality theory posits that “the different status identity holders within any given social group are differently situated with respect to how much, and the form of, discrimination they are likely to face.” Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 702 (2001). Therefore, to consider intersectionality is to consider the ways in

is because people often categorize and equate oppression.<sup>73</sup> Wildman and Davis argue that by focusing on intersectionality, people will be less likely to categorize someone's identity into separate sections.<sup>74</sup> This de-categorization will enable people to consider the interconnected aspects of a person's identities, and will therefore better illuminate both the privileges a White woman gains and also the oppression she may experience based on those intersecting identities. Therefore, persistently considering intersectionality will limit White individuals' tendency to equate oppression, thereby further diminishing their blindness to their privilege.<sup>75</sup>

A final way to confront and critique White privilege is the simple, yet important, suggestion to form a relationship with (or interact with) a person of color. Because Whites lead incredibly segregated lives, their tendency to view what is White to be what is normal is consistently reinforced. Therefore, by interacting with a person of color and actually listening to that person's experiences and concerns, a White individual will be able to slowly change how she sees and hears the world around her, making her understanding of the world less White-specific and therefore repeatedly revealing her White privilege.<sup>76</sup> Richard Delgado confirms the importance of this connection in his discussions of oppositional storytelling and the importance of voice. Although Delgado largely focuses his analysis on the lack of people of color in the academy, his observations reinforce Wildman and Davis's thoughts regarding personal

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which someone's different status identities (White, female, straight) impact the way she experiences and responds to discrimination.

<sup>73</sup> Wildman & Davis, *Language and Silence II*, *supra* note 4, at 573. Therefore, someone oppressed under one system (say sexism) can more easily ignore the way she is privileged and oppresses under another system (say racism). *Id.*

<sup>74</sup> *Id.* (noting that "[c]ategorical thinking obscures our vision of the whole, in which multiple strands interrelate with each other, as well as our vision of its individual strands").

<sup>75</sup> *Id.*; *see also* accompanying text to notes 29–30.

<sup>76</sup> Wildman & Davis, *Language and Silence I*, *supra* note 4, at 883–84 ("The lives we lead affect what we are able to see and hear in the world around us. So if you make a friend across categories of difference, realize that this means working on listening to what is important to your friend.").

connections and White privilege. Delgado explains how “[r]acial...isolation prevents the hearing of diverse stories and...diminishes the conversation through which we create reality...[i]t is through this process [of counterstorytelling] that we can overcome...the unthinking conviction that our way of seeing the world is the only one...when it is, for some, full of...both petty and major tyranny.”<sup>77</sup> Not only does listening to someone else’s story make it easier to listen to additional stories,<sup>78</sup> but by listening to the voices and stories of minorities specifically, listeners will be able “to see and correct systematic injustices that might otherwise remain invisible.”<sup>79</sup>

#### Part IV.B: The Importance of Confronting White Privilege

Employing different aspects of these suggestions, and thereby confronting<sup>80</sup> and critiquing my White privilege, not only enables me to become more aware of my own privileges and biases (an important and necessary change for anyone hoping to exist as a socially-minded person), but also makes me a better interviewer and investigator. When I conducted intake, I was required to interview the complainant about his situation and subsequently draft an official complaint based on that interview. By engaging in a “thorough-going skepticism” about policies or actions that appear to be facially neutral, I can become better aware of the ways in which my questions or actions during a meeting with a complainant may suggest a privileged

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<sup>77</sup> Delgado, *Storytelling for Oppositionists*, *supra* note 5, at 2439. Delgado also notes that stories “allow us to see how the world looks from behind someone else’s spectacles. They challenge us to wipe off our own lenses and ask, ‘Could I have been overlooking something all along?’” *Id.* at 2440.

<sup>78</sup> *Id.* at 2439.

<sup>79</sup> Delgado, *Does Voice Really Matter?*, *supra* note 5, at 109.

<sup>80</sup> When I use the phrase “confronting my White privilege,” I mean the act of recognizing that I am privileged because of my race, and that those material and psychological privileges are (1) meant to be invisible and (2) are simultaneously created by and maintain a greater system of racism and oppression.

understanding of the world.<sup>81</sup> For instance, instead of arguing with a woman who explicitly wished to speak with an African American investigator about the MCAD's applicable procedures, I could facilitate the conversation between the complainant and the MCAD's African American investigator, or schedule a time for the woman to come back to speak with her.

Connected to this, by consistently and consciously confronting my White privilege, I repeatedly challenge the assumption that what is White is what is normal. Consequently, in an effort to ensure that I am not imposing privileged assumptions about discrimination or the workforce on the respondent or complainant's story,<sup>82</sup> I will be more likely to ask open-ended questions as opposed to leading questions. By avoiding leading questions ("did you say X" or "did you think Y"), not only will I receive more honest answers from the parties, but I will also diminish the possibility that I will fill in any silences or unclear answers with my privileged beliefs about the realities of certain workspaces or the way discrimination occurs. Additionally, if I ask more open-ended questions, I consequently encourage more open narratives and allow the complainant to direct the intake process a bit more. This commitment to asking open-ended questions not only creates the best environment for a complainant to explain what happened and why she believes it was discriminatory, but it also establishes a strong dialogue and open

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<sup>81</sup> See Flagg, *supra* note 1, at 978 (explaining that if a predominantly White nominating committee were more skeptical of its privileged assumptions about the importance and usefulness of education or the candidate's business enterprise, the committee may not have asked the African American candidate questions about why she did not attend college or about the financial stability of her enterprise).

<sup>82</sup> For example, my privileged understanding the workforce (that you will succeed if you follow the neutral policies or that individual discrimination is intent-based and therefore rare) may impact what I focus on during the interview and what questions I ask. Although I will include in the complaint work-place issues I consider to be benign, I may also be less likely to flesh out those issues during the intake by asking follow-up questions, thereby making the complaint (and the subsequent investigation) less comprehensive and less representative of the person's experience.

## Confronting & Critiquing White Privilege in Anti-Discrimination Enforcement

communication, thereby utilizing the techniques described by Delgado, Wildman, and Davis to further combat my privileged understanding of the world and discrimination.

Along with interviews, confronting my White privilege will lead to better investigations and decisions. First, because challenging my White privilege will lead to more complete and detailed intakes and complaints, the investigation will similarly respond more thoroughly to the complainant's experiences. Creating more detailed and thorough complaints will also provide respondents with an important opportunity to consider additional aspects of its business, as opposed to just focusing on more individualistic features of discrimination, such as what a specific supervisor said. Secondly, by creating and maintaining skepticism about race-neutral policies, I will be more skeptical about the policies or reasons proffered by the respondent, which will make any decision I come to more comprehensive and accurate. Similarly, I will also be able to contextualize the complainant's position more successfully (why she may have reacted a certain way or why she may have understood the situation a specific way). Although I will certainly continue to enforce the intent-based, anti-discrimination jurisprudence as it has been articulated, by engaging in more conscious skepticism, I will be able to better explain the process or decision to complainants without assuming that they approach discrimination in the same intent-based way I do. I will also be in a better position to explain to respondents why a certain complaint may have been filed and why specific policies may appear problematic.

Additionally, by consciously confronting and analyzing my White privilege, I will be more successful at catching any privileged beliefs I may unconsciously hold. This will make me a more unbiased and neutral factfinder, thereby improving the accuracy and breadth of the investigative process, the ultimate decision, and the way that decision is explained or reasoned. Finally, because part of confronting my White privilege involves analyzing the ways in which

## Confronting & Critiquing White Privilege in Anti-Discrimination Enforcement

my intersecting identities as White and female both oppress and privilege me, I will be less likely to categorize other complainants' identities, particularly when complainants indicate multiple bases for their discrimination claim. This will improve my investigative skills because I will avoid dividing the complaint into separate, independent sections based on the complainant's different protected categories. Instead, I will be able to consider some of the more complex and interconnected ways that a complainant's identities may have impacted her treatment, thereby deepening my analysis and providing the respondent with additional opportunities to consider the different, often times less obvious ways that discrimination can occur in the workplace. Again, although I will certainly maintain my unbiased stance as a factfinder, confronting my White privilege will improve not just the decisions I make, but also how I discuss discrimination with both the complainants and the respondents.

### Part IV.C: Utilizing the MCAD & the ICHRC Techniques

Although I do believe the results that I have described above are likely and positive outcomes of consciously and repeatedly confronting my White privilege, during my work with the MCAD and the ICHRC, I operated largely without the important academic frameworks articulated by Wildman, Flagg, Davis, and Delgado. Therefore, in this final section, I would like to identify and analyze some of the policies utilized by the MCAD and the ICHRC that naturally and consistently allowed me to realize and challenge my White privilege, even if I may not have been aware I was doing it at the time. Coupled with the techniques described above, I believe that I can move forward as a more aware, successful, and neutral investigator.

The two primary procedures that I believe provide investigators with the best opportunity to realize and critique their White privilege are: (1) the intake process used by the MCAD and (2) the interview process used by the ICHRC. As explained above, the intake process at the

MCAD involves an investigator meeting with a complainant, discussing the complainant's situation, and writing an official complaint detailing the complainant's claims, which the complainant reviews and signs. Although this process certainly did create the possibility that, through my questions, I would unconsciously impose my privileged understanding of how discrimination is experienced or how a reasonable employee may react to a particular circumstance, it also made for better complaints<sup>83</sup> and provided me with two specific ways to realize and confront my privilege. First, as I mentioned above, one of the primary ways I began to recognize my White privilege and see my race as an aspect of my identity was by doing intake and becoming uncomfortable with my confusion about a person's racial discrimination claims. Therefore, as I conducted intakes and engaged in lengthy, detailed discrimination interviews with complainants who had lived primarily non-White-centric lives, I was repeatedly and forcefully confronted with different perspectives. This important and natural byproduct of conducting intakes consequentially revealed my limited and privileged understanding of discrimination and allowed me to begin to consider how I may be acting from a place of privilege in other phases of the investigation.<sup>84</sup>

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<sup>83</sup> In a more logistical sense, I believe this intake process is an important way to both provide the complainant with a space to explain and express her complaints and concerns, while also ensuring that the resulting complaint is as clear and detailed as possible, so that the response by the respondent (and the resulting investigation) can adequately respond to the actual allegations raised by the complainant. Although I do appreciate that the policy of the ICHRC (having the complainant write out her own complaint) discourages investigators from over-directing the process, I believe the first complaint should be a collaboration between the complainant, who lived the experience, and the investigator, who understands the applicable regulations.

<sup>84</sup> Again, although the intake policy used by the ICHRC also provided me with an opportunity to consider different perspectives when I later read the complaint, this process was less repetitive or immediate than the MCAD's and therefore did not require me to confront my privileged assumptions as forcefully or, I think, as successfully.

Secondly, the act of writing out the complaint with the complainant<sup>85</sup> enabled me to more immediately confront how my White privilege might have impacted the questions I asked or the things I focused on during the intake. For instance, after conducting an interview, I may have written the complaint in a way that focused only on aspects of the complainant's narration that I believed necessary for the investigative process. By going over the draft with the complainant (which often involved complainants wanting to add or clarify a certain statement in the complaint), I was repeatedly confronted with the ways in which my privileged assumptions did not necessarily conform to other people's experiences. Furthermore, even if I explained (as I often did) that the reasons for certain words or narrative choices were to file a complaint that closely corresponded to the MCAD's regulations, the conversation still provided me with the opportunity to consider *why* the regulations required certain statements or facts. These interactions consequently encouraged me to further examine the ways in which anti-discrimination regulations assume certain realities about the workforce, the ways that employers may discriminate, and what employees can show or prove.

The other procedure that has allowed me to better critique my White privilege is the ICHRC's procedure regarding communications with respondents and complainants. Under this policy, if an investigator contacts a party, both the contact and the response must be in writing so that the ICHRC has a record of what, exactly, the response is. Similarly, when an investigator interviews a party, the interview is recorded and then later transcribed for the record. This procedure is unlike the MCAD's approach, which usually involved investigators contacting respondents or complainants over the phone and simultaneously writing notes about the conversation into the MCAD's computerized complaint system. Although I of course endeavored

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<sup>85</sup> At the MCAD, there was a computer in the intake room so that when I wrote up the complaint, I could make sure I was drafting one that was factually correct and detailed.



to write down thorough and accurate notes at the MCAD, I believe that the ICHRC's procedure not only created more accurate investigations, but also mitigated against my White privilege. First, because I knew the conversation was recorded, I was more present during the interview and could concentrate on asking open-ended and follow up questions, instead of primarily focusing on making sure I got the correct information and was not missing anything. This knowledge also allowed me to be more receptive to the party's story and different perspective, thereby further broadening my understanding of the world. Similarly, when I would later read the transcript of the party's written response, I was forced to examine his or her exact statements rather than my personal notes about the interaction. This procedure therefore incorporated aspects of Delgado's observations about the importance of voice and storytelling. Specifically, it provided me with more accurate, and therefore more powerful, descriptions of the person's experience, and also lessened my unconscious tendency to impose my privileged beliefs or assumptions on the party's statements either during or after the interview; I was therefore better at responding to their actual concerns or experiences.

Secondly, because this policy ensured that I would have a written record of the conversation, I was able to review the conversation not just for the party's statement, but also to consider how I had asked a question or whether I had approached the conversation in a particular way that indicated my White privilege. I was presented with clear examples of how a certain question or conversational technique may have limited a complainant's response because of the privileged way it was asked.<sup>86</sup> Specifically, although I may not have been able to articulate it this way, having the printed out transcript provided me with the opportunity to analyze and update

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<sup>86</sup> See e.g. *supra* note 81 (describing how confronting White privilege may cause White interviewees to reevaluate how a seemingly race-neutral policy or question can have different implications for someone who is not White).

the types of questions I asked, or the way I interacted with complainants reporting discrimination based on race, in order to mitigate against future privileged assumptions. For instance, if, after reading a transcript, I noticed that I asked too many specific, leading questions, such as “Did you think this way because of X” or “Did anyone say X to you,” I was better able to self-correct and ensure that future interviews or conversations were less restrictive and provided the complainant or respondent with a greater opportunity to direct the conversation and explain what happened from his or her perspective. Therefore, even though I was not consciously utilizing the techniques described by Flagg, Wildman, Davis, and Delgado, both the MCAD’s initial intake procedure and the ICHRC’s subsequent interview policy provided me with concrete and important ways to recognize, critique, and mitigate against my White privilege.

#### PART V. CONCLUSION

In concluding this essay, I am left surprised with the direction it took me. When I was first conceptualizing this essay, White privilege was just one aspect of it and I was prepared to simply state that confronting White privilege was an important component of becoming a more aware, socially-conscious citizen. While I still think that that statement is correct, by more thoroughly tracing the evolution of my understanding and criticism of my White privilege, I believe I have not only identified certain techniques that may be useful in the future to continue this important examination, but I have also learned how I have changed and how I must continue to change. Although there are certainly troubling aspects of anti-discrimination jurisprudence that, in effect, require individuals to proactively and consciously recognize and mitigate against White privilege, by examining my time at the MCAD and the ICHRC, I also believe this process

can, at times, be natural and affirming. It just depends, I think, on how open I am to those changes. As Wildman explained, “Self-consciousness can be the first step toward action.”<sup>87</sup>

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<sup>87</sup> Wildman, *supra* note 4, at 264–65.